In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-446

HAMMOND LEAD PRODUCTS, INC., PETITIONER

v.

UNITED STATES (RALPH VALLS, PARTY-IN-INTEREST)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, an American manufacturer of litharge, filed this suit in the United States Customs Court as a protest to the refusal of the Secretary of the Treasury to impose countervailing duties on imported litharge. Section 303 of the Tariff Act of 1930 (19 U.S.C. 1303) requires the secretary to impose a countervailing duty on imports whenever any country gives a "bounty or grant" to the export, equal to such bounty or grant. The Secretary found that the Mexican Government had not given a "bounty or grant" on certain litharge manufactured in Mexico and imported into the United States.

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Litharge, a compound of 93 percent lead and 7 percent oxygen by weight, is manufactured by the process of oxidizing refined lead. As a lead oxide, it was at the time of importation exempt from the Mexican export tax of 14 to 27.5 percent *ad valorem* that was imposed by Mexico on other simple lead manufactured products, *i.e.*, lead bars, wire, sheets, plates and pipes (R. 195–196).[1] In addition, it was not subject to Mexico's export tax of 2.27 cents per pound on refined lead (R. 192–193).

Section 516(b) of the Tariff Act of 1930, as amended (19 U.S.C. 1516(b)) permits the Customs Court to entertain protests to the "classification" or the "rate of duty" on imported merchandise. Respondents moved in the United States Customs Court to dismiss the protest for lack of jurisdiction, claiming that the Secretary's countervailing duty decision involved neither of those categories. The Customs Court denied the motion (Pet. App. C, pp. 47a–66a).

Thereafter a trial was held on the merits. At its conclusion, the Customs Court (Pet. App. B, pp. 25a–46a) found (a) that the export tax on refined lead gave Mexican lead consumers, including litharge producers, an advantage over foreign consumers of refined lead; and (b) that the export tax on simple lead products, except lead oxides, gave the litharge producers in Mexico an advantage over Mexican producers of other lead products (Pet. App. B, pp. 38a–41a). As a result of these advantages, it concluded that

[1] "R." references are to the record of proceedings in the Customs Court.

(*id.* at p. 42a), "Mexican litharge is sold in the United States at a price well below that which can be quoted by domestic litharge producers in the United States." Finding further "a definite cause and effect relationship" between the export tax exemption and the "large increase of Mexican litharge" importations into the United States (*id.* at p. 43a), the court sustained the protest, holding that "the Mexican system of taxation on refined lead and lead manufacturers constitutes a bounty or grant on the exportation of litharge" (*id.* at p. 38a).

An appeal was taken to the United States Court of Customs and Patent Appeals; the United States sought review only on the merits, whereas Ralph Valls, the importer of the litharge involved here (R. 15), also contested the jurisdictional question. A divided court reversed solely on the ground that the Customs Court lacked jurisdiction under Section 516(b) (Pet. App. A, pp. 1a–24a). The majority held that the Secretary's decision respecting countervailing duties involved neither the "classification" of litharge, nor the "rate of duty" thereon, within the meaning of the statute. It concluded (*id.* at p. 12a): "it appears that countervailing duty is a penal exaction that the Congress did not intend the courts to impose, should the Treasury be recalcitrant, in a 516(b) proceeding, and is not a 'duty' within the meaning of that section."

1. The only issue presented in the petition is whether Section 516(b) confers jurisdiction upon the Customs Court to entertain a protest by an American manufacturer challenging the Secretary of the Treas-

ury's denial of countervailing duties. The government took no position on that question in the Court of Customs and Patent Appeals, and we similarly take no position here.

We do point out, however, that the question is a narrow one turning solely on the construction of that particular Section of the Tariff Act. It has been resolved by the court specifically established to decide customs disputes. Congress can readily amend Section 516(b) if it is dissatisfied with the holding below. There thus seems to be no occasion for review by this Court.

2. Moreover, the Secretary's refusal to impose countervailing duties on the ground that Mexico does not confer any "bounty or grant" within the meaning of Section 303, was, we submit, correct. Unlike the bounty or grant involved in *Nicholas and Co.* v. *United States*, 249 U.S. 34, the Mexican tax system provides no "inducement to seek the foreign market." 249 U.S. at 37. That is, Mexico's tax system provides no incentive for Mexican producers to export their litharge rather than to sell it in Mexico. In addition, the fact that Mexico does not tax its litharge exports does not give Mexican litharge any artificial advantage over litharge produced in the United States, in contrast to the type of artificial advantage presented in *Downs* v. *United States*, 187 U.S. 496. In these circumstances, the Secretary was fully justified in not imposing any countervailing duty upon Mexican litharge.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1971.

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